IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 378.

KENNETH J. MULLANE, as Special Guardian and Attorney, etc.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc., *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Hereinafter the trustee-appellee is referred to as the "Trust Company", the special guardian-appellee as the "guardian-appellee" and the New York State Bankers Association as the "Bankers".

The Taking of Property.

The Trust Company grants in effect that it is settled, as a matter of the statutory construction of a New York statute by the New York Courts, that subdivision 14 of said Section 100-c (Appellant's brief, pp. 100-101) requires a judicial decree which forecloses the persons interested in income from subsequently attacking the Trust Company in any capacity

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NOTE: Appellant wishes to direct the attention of this Court to a typographical error, on page 25 of his main brief, in the citation in the parentheses immediately following the quotation from *Matter of Bank of New York*: The correct reference is: 189 N. Y. Misc. 459, at p. 470.

for any damage or loss caused to their respective participant trusts by reason of any action taken by the Trust Company within the Common Trust Fund. Such concession is evidenced by the following: (a) the Trust Company's failure to challenge our position on this point, although it quarrels with our conclusion as to the nature of the proceeding in which such rights are foreclosed; (b) the statement in its brief (p. 7) "The accountings for the common fund adjudicate only the propriety of the investments and *other proceedings* within the common fund"; (c) by its concentration solely on the question of the adequacy of the notice of hearing (Trust Company's brief, pp. 4, 13-42) although it declares that a ". . . constitutional question . . . was squarely passed upon by all courts, including the highest court of the State of New York" (brief, p. 4).

In its brief to the Court of Appeals (p. 5) the Trust Company asserted: "*To the extent that it affects or forecloses rights of the beneficiaries of the participating trusts, it may be regarded as pro tanto an accounting for the respective trusts*". This statement has been deleted from its brief to this Court and the verbiage on page 7 substituted therefor. Of course the accountings on the Common Trust Fund do not eliminate the accountings on the participant trusts—no one ever claimed that they did. But, as demonstrated in our main brief (pp. 23-33, 69-71), the common fund account is a partial substitute, to the extent of the investment therein by the participant trust, for the account on the participant trust. If the entire participant trust is invested in the common fund, the *heart* of the matter is determined in the

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NOTE: All italics are supplied by appellant unless otherwise noted.

common fund accounting and merely the *shell* is left for the accounting on the participant trust.

The right to question the making of an investment from a participant trust by the Trust Company, as trustee thereof, in a common fund is not foreclosed by the decree on the account of such fund for the reasons set forth in our main brief (pp. 31-32).

The Bankers adopt "the statement of facts and the arguments made by the respondent, Trustee, . . ." (Bankers' brief, p. 2).

It is difficult to determine just what position the guardian-appellee has taken in this Court on this question of the foreclosure of the persons interested in income by the decree on the common fund account since he has deleted from his brief the following assertion made in his brief to the Court of Appeals (p. 6): "*. . . if on the settlement of the accounts of the trustee administering a particular trust a beneficiary should object to the failure of the trustee to withdraw the units held prior to the time when such withdrawal actually took place, the issue thus formulated would not be foreclosed by the circumstance that the trustee in its capacity as trustee of the Common Trust Fund had had its accounts settled for a period which included the date as of which the objectant asserts the units in which he is interested should have been withdrawn.*"

In any event, we have shown in our main brief (pp. 23-33) that the Court of Appeals in this proceeding has construed subdivision 14 of Section 100-c (our brief, pp. 100-101) to require a judicial decree which deprives the persons interested in the income of the particular 48 *inter vivos* trusts of property which vested in them before the enactment of said Section

100-c and that such construction is binding on this Court (see also *Demorest* v. *City Bank*, 321 U. S. 36, 42, 49; *Sauer* v. *New York*, 206 U. S. 536, 545-548).

The Nature of the Proceeding for the Settlement of the Common Fund Account.

The appellees (Trust Company's brief, pp. 14-42; guardian-appellee's brief, pp. 4-9) and Bankers (its brief, pp. 7-11) rest their entire case on the answer to one question, to wit: is the proceeding for the settlement of the account of the Trust Company as trustee of its Discretionary Common Trust Fund an exclusively *in rem* proceeding? Parenthetically, it may be noted that, as Mr. Justice Frankfurter wrote in *Williams* v. *North Carolina*, 317 U. S. 287 at 297, ". . . it does not aid in the solution of the problem presented by this case to label these proceedings as proceedings *in rem*".

As we believe we have demonstrated in our main brief (pp. 46-58), even if the correct answer to the above question were an affirmative (which it is not) such reply would not be decisive of this appeal.

The critique made by this Court in *Security Savings Bank* v. *California*, 263 U. S. 282, 284-285 of the statute there involved shows that the touchstone of determination as to whether a particular proceeding be wholly *in rem*, wholly *quasi in rem*, entirely *in personam*, or partake of the nature of two or all of the foregoing is found in the nature of the rights sought to be affected by the judicial decree in the suit. A sound decision as to what rights are sought to be affected, and as to the essence of such rights, must be

based on analyses of the legislation authorizing the judgment and of the nature of the specific rights.

The Trust Company (its brief, pp. 14-19), and Bankers (brief, pp. 7-11) bottom their claim that the proceeding on the account of a common fund is wholly *in rem*, not on any such critique of said Section 100-c nor on any New York decision construing the Act but on the factors set out below.

(a) The Trust Company assumes that a judgment cannot be *in personam* unless it imposes a personal liability. The decisions of this Court establish that a judgment which relieves one person from liability to another person is a judgment *in personam*, *Estin* v. *Estin*, 334 U. S. 541. *Commonwealth Co.* v. *Bradford*, 297 U. S. 613; *N. Y. Life Insurance Co.* v. *Dunlevy*, 241 U. S. 519; *Hart* v. *Sansom*, 110 U. S. 151.

(b) Another false assumption is that personal service of process within the territory of the forum is necessary to sustain a judgment *in personam* as to non-residents. This error pervades the brief of the Trust Company (pp. 14-19, 27-28), receives explicit expression in that of Bankers (pp. 7-10), and confuses the guardian-appellee (his brief, p. 4). This fundamental misconception is symptomatic of the fact that appellees and Bankers have confounded the problem of a State's jurisdiction over persons with that of notice of hearing. The following decisions of this Court establish that such personal service is not an essential foundation for a judgment *in personam* against non-residents: *Hess* v. *Pawloski*, 274 U. S. 352; *International Shoe Co.* v. *Washington*, 326 U. S. 310; *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346. That these cases are not *sui generis* is conclusively shown

by the following statement of this Court in *International Shoe Co.* v. *Washington* (*supra*, at p. 316):

> "Historically the jurisdiction of courts to render judgment *in personam* is grounded on their *de facto* power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him, *Pennoyer* v. *Neff*, 95 U. S. 714, 733. But now that the *capias ad respondendum* has given way to personal service of summons *or other form of notice*, due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."

In our main brief (pp. 36-37) we granted that New York had a personal jurisdiction over the persons interested in income limited as there stated. Such concession was explicitly based by us on, and compelled by, the rulings of this Court in *Wuchter* v. *Pizzutti*, 276 U. S. 13, and *International Shoe Co.* v. *Washington*, *supra*. Certainly a person interested in the income of an *inter vivos* trust whose situs of administration is New York has more contacts with such State than the minimum laid down in the *International Shoe* case (*supra*). Likewise our position (R. 117; our brief, p. 13) that personal service of a citation was not required on the common fund account necessarily followed from the above cited decisions of this Court and not, as Bankers suggests (p. 8) from any attempt to avoid an alleged result of our position.

We believe that our analysis disposes of the claim in Bankers' brief (pp. 2, 8) that if our position is sustained the validity of all decrees on accountings for trusts will be open to question. On the contrary, if the position of the appellees and Bankers is approved by this Court, it will mean that the notice of hearing used herein will be validated not only for common trust fund accountings but for *all* trust accountings. This is a necessary conclusion from their arguments that *all* trust accountings are exclusively *in rem* proceedings and that in such suits notice by posting or publication without naming interested persons and without mailing is constitutional due process. If such notice of hearing were due process as to persons currently interested in the income of a common trust fund, whose current names and addresses are necessarily on the books of the trustee (appellant's brief, p. 39), then *a fortiori* it would satisfy due process in accountings for individual trusts where "the ascertainment of the names and addresses of the beneficiaries not infrequently involves months of delay, hiring of investigators and substantial expense. (R. 39, 40-41, 47)" (Trust Company's brief, p. 9).

A State may have jurisdiction over the subject matter and the persons involved and be unable to empower its courts to render a valid decree because the notice of hearing specified violates due process, *Wuchter* v. *Pizzutti*, *supra*; *McDonald* v. *Mabee*, 243 U. S. 90; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 168.

(c) A third specious argument of the Trust Company (its brief, p. 16) is that ". . . the correlative rights . . ." to ". . . the liability of a trustee to surcharge . . . are assets of the fund itself and, as

such, are within the jurisdiction of the court" and of Bankers is that "the trust *res* also includes any claim that may exist against the trustee for any breach of trust" (Bankers' brief, p. 9). Bankers cites no authority to support this naked assertion.

An estate or trust fund has no legal existence in New York law apart from the fiduciary, *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394, 407. The rights *in personam* of the beneficiaries against the Trust Company discussed in our main brief (pp. 18-23) are vested in the beneficiaries. To be "assets of the" common trust fund they would have to be vested in the Trust Company as trustee of the common fund because the Act explicitly provides that "ownership of . . . assets . . . of the common trust fund shall be in the trust company as trustee of such trust fund" (subd. 2, our brief, p. 8). It is true that a guilty but repentant trustee has a right to enforce the trust against a guilty co-trustee but such right is derivative and based solely on the right to enforce the trust vested in the beneficiary, Scott on Trusts, p. 1082.

The example given by the Trust Company (brief, p. 16) of the usual form of a surcharging decree in New York is incorrect. The usual form of such decree as to an income surcharge, directs the fiduciary in its *individual* capacity to pay from its *individual* funds to the *particular* objecting income beneficiary the amount necessary to repair the loss to that particular income beneficiary only (Bradford Butler, New York Surrogate Law and Practice (1941), Vol. 4, sec. 2840). The authority cited by the Trust Company (op. cit., sec. 2838) does not support its claim.

The three cases cited by the Trust Company on page 16 of its brief merely hold, as a matter of stat-

utory construction, that unless the services of an attorney retained by one legatee benefit all legatees he must look for compensation solely to his own client.

(d) In support of its assertion that the proceeding for the settlement of the account for a common fund is wholly *in rem* the Trust Company cites (its brief, p. 15) four cases, none of which involves such an account.

In the first cited case, *Matter of Buckman*, 270 App. Div. (N. Y.) 707, affd. 296 N. Y. 915, cert. denied 332 U. S. 763, the Appellate Division reversed a Surrogate's decree on an *executor's accounting* and held that "In so far as the appellants are concerned the proceeding is one *in personam*. It is one in which a personal liability may be imposed upon them." The decision supports our position rather than that of appellees.

In the second case, *Devlin* v. *Rousell*, 36 App. Div. (N. Y.) 87, it was ruled that New York had jurisdiction *in personam* over an administrator appointed by a New York court. The result is right, but the basis given in the opinion is erroneous in view of the holding of this Court in *Michigan Trust Co.* v. *Ferry*, *supra*. In any event since the Appellate Division is inferior to the New York Court of Appeals, this decision cannot be regarded as weakening the holding of the Court of Appeals in *Schenck* v. *Barnes*, 156 N. Y. 316 and in *Whiting* v. *Hudson Trust Co.*, *supra*, which latter case was decided twenty-four years after the *Devlin* case, *supra*.

The third case cited, *In re Vogel's Estate*, 176 Misc. (N. Y.) 368, involves a decision, not by an appellate

court of New York, but by a Surrogate holding, in a proceeding concerning an estate properly under the said Surrogate's jurisdiction, that service by publication on the administrator appointed by New York is proper. [Under New York law, service by publication also requires mailing (appellant's main brief, pp. 102-105).] We submit that the result reached by the Surrogate, like that in *Devlin* v. *Rousell*, *supra*, is correct although the reason given is wrong.

The last case, *Henricksen* v. *Baker-Boyer National Bank*, 139 Fed. 2d 877, concerned the effect of the construction by a court of the State of Washington of a will of a deceased resident in which State notice of hearing by posting or publication is an ancient practice (see *Anderson National Bank* v. *Luckett*, 321 U. S. 233). How such a decision can be determinative of the nature of a proceeding on the account of a common fund established by New York law where no such ancient practice exists (our brief, pp. 102-105) is not explained by the Trust Company.

(e) Finally the Trust Company cites (its brief, pp. 18-19) as analogies which *should control* the nature of an account for a New York common trust fund, which trust is in essence an *inter vivos* trust (R. 60-61; subdivisions 1 and 2 of said Section 100-c, appellant's main brief, pp. 91-92, 7-8), cases dealing with construction of wills (*Smith* v. *Central Trust Co.*, 12 App. Div. (N. Y.) 278; *Henricksen* v. *Baker-Boyer National Bank*, *supra*), a decision holding a Surrogate's decree on an executor's accounting to be in part *in personam* (*Matter of Buckman*, *supra*), opinions involving the jurisdiction of the state of incorporation over the affairs of the corporations it creates (*Shipman* v. *Treadwell*, 208 N. Y. 404; *Converse* v.

Hamilton, 224 U. S. 243; *Broderick* v. *Rosner*, 294 U. S. 629), and a decision involving the jurisdiction of the state of the marital domicile over the marriage status (*Jackson* v. *Jackson*, 290 N. Y. 512).

To this argument from analogy the following declaration of the New York Court of Appeals in *Hutchison* v. *Ross*, 262 N. Y. 381, 391-392, is a complete answer:

> "The paucity of old judicial decisions upon conveyances in trusts *inter vivos*, compared with the number of decisions upon testamentary trusts, shows that conveyances in trust *inter vivos* were comparatively rare. *Thus the possible importance of drawing distinctions between the rules applicable to testamentary trusts and trusts inter vivos was not apparent or brought to the attention of the courts.* . . .
>
> ". . . Analogy furnishes no satisfactory guide, for analogy in either case is imperfect and incomplete."

When it is recalled that a New York common trust fund is a new device in which certain specified *self-dealing* by trust companies in handling trust funds is legalized it is apparent that "analogy furnishes no satisfactory guide . . .".

The guardian-appellee proceeds differently but no more effectively. He bases his claim that the accounting for a New York common trust fund is wholly *in rem* on the two factors discussed below.

(a) The guardian-appellee claims that the common trust fund is a separate entity, obviously basing such assertion on the following language of the Surrogate

in *Matter of Bank of New York*, 189 Misc. (N. Y.) 459, 463: "This concept of the common trust fund requires the court to deal with such a fund as an entity separate from the trustee and separate from the individual estates whose moneys are invested in participations in the fund." If this statement is intended to mean anything more than that a new trust relation has been created such assertion finds no support in said Section 100-c in which the term "separate entity" does not appear. If the purpose of the quoted declaration is to convey the idea that a common trust fund has some legal existence apart from the trustee of such common fund, such as a corporation has, such concept is repudiated by the phraseology of subdivisions 1 and 2 of said Section 100-c (appellant's main brief, pp. 91-92, 7-8), and is negatived by the statement of the Court of Appeals in *Whiting* v. *Hudson Trust Co., supra*, at p. 407, that a trust has no legal existence apart from the trustee.

(b) In aid of his claim that the common fund accounting is wholly *in rem* the guardian-appellee cites a decision of the New York Court of Appeals (*Matter of Horton*, 217 N. Y. 363) which passed upon the effect of a probate decree rendered by an Ohio court pursuant to a statute of Ohio providing for probate in the common form. The relevancy of this case is not demonstrated.

Consequently it is seen that neither appellees nor Bankers have attempted to deduce the effect of a decree on a common trust fund account, from the language of said Section 100-c, nor have they made any analysis of the nature of the rights of the persons interested in the income of the common fund by reason of their interests in the income of the 48 participant *inter vivos* trusts.

Judgments *in rem* and *quasi in rem* seek to determine rights based on relations between a thing and persons: a judgment *in rem* determines the relations of all persons to the thing and a judgment *quasi in rem* determines the rights of particular persons to the thing (Restatement of Judgments, secs. 2, 3). Since it is obvious that control of the thing is decisive, the power of the State, having control of the thing, to create interests therein either by destroying existing ones or creating new ones will be recognized as valid in other States, provided the notice of hearing and opportunity to be heard comply with the Federal Constitution (Restatement of Conflict of Laws, sec. 42, comment b thereto). As shown in our main brief (pp. 58-67) a judgment *in personam* seeks to determine rights based on a relation between persons. It is apparent that one State's power over one person to the relation is not decisive because another State may have power over the other person to the relation.

From this it necessarily follows that no issue of jurisdiction over persons can arise in a proceeding that is either exclusively *in rem* or is wholly *quasi in rem*.

Hence it is manifestly wrong to state as does the Trust Company (p. 14) that because "a trust accounting proceeding is a proceeding *in rem*" and because "the court has jurisdiction over both the trustee" (who is only one party to the relation, the beneficiary being the other) "and the fund itself, the court has jurisdiction . . . to exonerate the trustee from liability" (obviously to the other party to the relation) "for the acts accounted for—". In a trust accounting proceeding under New York law a court has jurisdiction over the beneficiaries, not because the proceeding is *in rem*, but because of the considerations expressed by this

Court in *Wuchter* v. *Pizzutti* (*supra*) and *International Shoe Co.* v. *Washington* (*supra*).

We believe we have shown in our main brief (pp. 18-23) that under New York law the beneficiaries of an individual trust have no title to the assets constituting the trust *res*, but do have a right *in personam* against the trustee to enforce the trust. In fact this Court in *Demorest* v. *City Bank*, 321 U. S. 36, 40-41, apparently recognized that such is New York law. *A fortiori*, the persons interested in the income of a New York common trust fund can have no title to the assets constituting the trust *res* since subdivision 2 of the Act (appellant's main brief, p. 8) explicitly provides: "No fiduciary of any estate, trust or fund having any such share or interest in a common trust fund *nor any person having an interest in any such estate, trust or fund shall have or be deemed to have any ownership in any particular asset or investment of such common trust fund. The ownership of such individual assets and investments of the common trust fund shall be in the trust company as trustee of such trust fund.*" Therefore it is clearly incorrect to infer as does the Trust Company (brief, p. 16) that the purpose of a decree on a common fund account "is to adjudicate *rights as between claimants to the res*" (italics in original), or to assume as does the guardian-appellee (brief, p. 6) that persons interested in the income of a common fund ". . . own . . . the property".

Since it is true that in order to render either a judgment *in rem* or a judgment *quasi in rem* a court does not need any jurisdiction over persons it is obvious that no issue as to jurisdiction over persons can be raised in any proceeding which is solely *in rem* or

wholly *quasi in rem*. We believe that we have shown in our main brief (pp. 23-33) that the Court of Appeals in this proceeding, by answering the first question certified to it by the Appellate Division (R. 219-220) necessarily held that this proceeding for the settlement of a New York common trust fund is partly *in personam*. In every appellate court we have consistently argued that this proceeding is partly *in personam* because the decree thereon destroyed rights *in personam*.

Neither the Trust Company nor Bankers makes any direct answer to this argument. The guardian-appellee merely asserts that it is "highly technical", "without substance" and is an "hypercritical construction" (his brief, p. 4). He cites no authorities to support him, nor does he make any explanation why our position on this point merits the adjectives applied. Appellate procedure by its nature is "highly technical" as the history of this case in the New York courts demonstrates (R. 203-208). A highly technical claim merits condemnation only when it obscures a reality not when it makes that reality clearer. Implicit, though unrealized, in this criticism of the guardian-appellee, is the assumption that the Appellate Division wasn't aware of the issues present in this case, when it formulated and certified to the Court of Appeals the first question in its order (R. 219-220) and that the Court of Appeals didn't know the issues it decided when it answered such question in the affirmative (R. 213).

The guardian-appellee (brief, p. 4) asserts: "Indeed, the appellant is seeking on this appeal to have that selfsame answer of the Court of Appeals repudiated." Seemingly, the inference is that we are in-

consistent in approving the answer of the said Court as to the construction of a New York statute while seeking to have the reply repudiated by this Court because it violates the Federal Constitution. There is no contradiction between our two positions. The meaning assigned to a New York Act by the New York Court of Appeals is binding on this Court, *Demorest* v. *City Bank*, *supra*, 42, 49; *Sauer* v. *New York*, *supra*, 545-548.

The decision of said Court of Appeals as to the legality under the Federal Constitution of the effect of such interpretation is not binding on this Court, which is the final arbiter of such legality.

The Notice of Hearing.

The Trust Company and Bankers both misstate our position when the former writes (Trust Company's brief, p. 13): "Appellant repeatedly and persistently states, as the real issue in this case, the adequacy of the statutory notice in a proceeding 'which destroys rights *in personam*' ", and when the latter asserts (Bankers' brief, p. 7): "The appellant contends that such a proceeding is not solely one *in rem*, but in various aspects must be deemed to be a proceeding *in personam*. This is the basis of substantially the whole argument of the appellant."

We maintain the two propositions set forth below:

(1) Although the names and addresses of the persons, including non-residents, who are currently interested in the income of said 48 *inter vivos* trusts, are on the books of the trust company, the Act requires a notice of hearing in which they are not

named, and which is served by local publication only without mailing. Such notice violates due process of law even if the present proceeding were entirely *in rem* or were wholly *quasi in rem*.

(2) *A fortiori,* since the decree herein purports to take away personal rights of said persons whose names and addresses are on the books of the Trust Company, service upon them by a local publication only, in which they are not named, and without mailing, contravenes due process of law.

The Trust Company and Bankers ignore the first contention completely.

Neither of the appellees nor Bankers has cited a single case holding that where such a concatenation of facts exists, as is shown in our main brief (pp. 38-42), notice constitutionally may be given by posting or publication or may be dispensed with altogether.

In addition to the cases discussed in our main brief the appellees and Bankers cite in their briefs more than seventeen decisions. Obviously, it is impossible to analyze these in detail as to the issue of notice of hearing in a reply brief. Of such decisions, the following support appellant rather than the appellees because the statute in each case required either the naming of known persons in the process or mailing to persons whose addresses were known or which could be ascertained with reasonable diligence or both naming and mailing: *Devlin* v. *Rousell* (36 App. Div. (N. Y.) 87); *Matter of Fogel* (176 Misc. (N. Y.) 368); *Tyler* v. *Judges* (175 Mass. 71, 55 N. E. 812); *Smith* v. *Central Trust Co.* (12 App. Div. 278); *Jackson* v. *Jackson* (290 N. Y. 512); *Matter of Buckman* (*supra*); *Arndt* v. *Griggs* (134 U. S. 316); *Matter of Cobb* (N. Y. Law Journal, Dec. 13, 1946, p. 1725, aff'd 272

App. Div. (N. Y.) 793); *Matter of Auditore*, 249 N. Y. 335.

The following cases all related solely to the probate or construction of wills: *Matter of Horton* (217 N. Y. 363); *Henricksen* v. *Baker-Boyer Bank* (139 Fed. 2d 887); *Woodruff* v. *Taylor* (20 Vermont 65); *Crippen* v. *Dexter* (13 Gray 330); *Bonnemort* v. *Gill* (167 Mass. 338). A probate or construction proceeding does not destroy rights *in personam* and is in no way analogous to the circumstances present in a Common Fund account (see *Culbertson* v. *Whitbeck Co.* (127 U. S. 326)). Moreover in all the States involved in these decisions notice by posting or publication in probate proceedings was a matter of ancient practice (see *Anderson National Bank* v. *Luckett*, 321 U. S. 233), whereas it is not in New York (appellant's main brief, pp. 102-105).

Shipman v. *Treadwell* (208 N. Y. 404), *Converse* v. *Hamilton* (224 U. S. 243) and *Broderick* v. *Rosner* (294 U. S. 629), cited by the trustee all concerned the problem of jurisdiction of the State and have no relevance to the question of notice.

As to the case of *Broderick's Will* (88 U. S. 503) no constitutional issue of due process of law was or could be raised in that case since the probate and distribution proceedings which were attacked were completed at least seven years before the ratification of the Fourteenth Amendment to the Federal Constitution in 1868.

Both the Trust Company and the guardian-appellee by isolating clauses from their context in the opinions of the respective courts have endeavored to give the impression that such isolated statements formulate a

general rule applicable to all cases when in fact the language in its proper context is plainly applicable only to the particular situation. For example the Trust Company writes (brief, p. 19) "it 'belongs to the legislature to determine in the particular instance . . . what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him' ". The inner quotation is from *Matter of Empire City Bank*, 18 N. Y. 199, 216 and the clause elided reads: "whether the case calls for this kind of *exceptional* legislation" which materially alters the meaning. Also on page 19 of its brief, the Trust Company writes "and the question being 'one of local experience . . . this court ought to be very slow to declare that the state legislature was wrong in its facts or abused its discretion' ". The inner quotation is from *Security Savings Bank* v. *California, supra*, at p. 290 and appears in a conclusory paragraph after a page devoted to discussing the *particular facts* on which the legislature based its determination.

The guardian-appellee writes (brief, p. 9) "only in a clear case of insufficiency will a notice authorized by the legislature be set aside (*Goodrich* v. *Ferris*, 214 U. S. 71, 81; *Bellingham Bay Co.* v. *New Whatrom*, 172 U. S. 314, 318-319)." The phrase is taken from this Court's opinion in *Goodrich* v. *Ferris, supra*, at p. 81, but what this Court, quoting the *Bellingham Bay* case (*supra*) said is

> ". . . yet it is certain 'that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual *on account of the shortness of time*.' "

Our Alleged Irrelevant Issues.

The Trust Company has chosen to express its belief that we are "inadvertently" guilty of misleading this Court and of discussing irrelevant issues (its brief, pp. 10-13). We discuss below only those of the matters specified by the Trust Company which we deem important.

(a) As to the conflicting loyalties of the Trust Company, an adequate answer is found in this statement from *Matter of Bank of New York*, 189 N. Y. Misc. 459, 463: "The legislation dealt with the subject of commingling and self-dealing in relation to such a fund . . ." Self-dealing by a trustee necessarily connotes conflicting loyalties. The legalized existence of such conflict is an essential fact to be considered in evaluating a notice of hearing on the accounting by a Trust Company legally authorized to indulge in specified self-dealing. It is not a sufficient answer to reply that Section 100-c prohibits the trustee of a common fund from dealing with itself in its individual capacity and from purchasing securities from itself individually or from an affiliate (subd. 4, Section 100-c, appellant's brief, pp. 93-94). The rule prohibiting self-dealing by a trustee is of very long standing yet the existence of such rule has not prevented the recurrence of such self-dealing (*Matter of Ryan*, 291 N. Y. 376 at 385, 394; *In re Lewisohn*, 294 N. Y. 596, at 608). We note this, not by way of objection to the common fund, but to emphasize the need for a genuine notice of hearing.

(b) Concerning the physical makeup and appearance of the citation as published, the reading operation mentioned in appellant's brief was intended to

refer to the reading of the citation as published in the printed record (R. 24-32). The Trust Company (brief, p. 12) refers to the rule of the Appellate Division, First Department, as to publication in the New York Law Journal but cites no decision to the effect that such rule can override the specific discretion granted to the Surrogate or Supreme Court by subdivision 12 of said Section 100-c (appellant's brief, pp. 98-99) to select the newspaper. Apart from this, such rule does not apply throughout the rest of New York State.

The Trust Company also alleges (brief, p. 12) that we have gone outside the printed record to demonstrate the lack of any appearance by any beneficiary in the five common trust fund accounts settled by judicial decree in New York. The official New York reports referred to in our brief (p. 45) print the names of those who appear. Reference to the appearances set forth in an official law report is no more going outside the record than discussing facts related in an opinion in such report. In any event the Trust Company does not and cannot challenge the truth of our statements as to lack of appearances.

However, the Trust Company convicts itself of the precise indictment made against us as follows:

(a) No issue exists herein with respect to the rights of persons interested in principal (appellant's brief, p. 13). Despite the explicit statement in our brief (p. 13) as to the reasons for our necessary silence as to the rights of persons interested in principal, the Trust Company employs, in its brief (pp. 37-39), the familiar stratagem of setting up a sham issue regarding the rights of persons interested in principal by imputing to us a contention that there exists "a dis-

tinction between the constitutional rights of current income beneficiaries and the other beneficiaries whose names and addresses are also known or ascertainable" (Trust Company's brief, p. 37).

(b) Another example of this tactic is found in the Trust Company's elaborate discussion of the difficulties of ascertaining the names and addresses of the persons interested in principal (Trust Company's brief, pp. 8-10, 38-39). Although the trustee in such argument has lumped the persons secondarily interested in income together with those interested in principal it is perfectly apparent that the trustee of the Common Fund either knows or could readily ascertain with reasonable diligence the names and addresses of every person interested in income whether presently or in the future (appellant's brief, pp. 39-40); indeed, all respondents' witnesses in substance so testified (R. 43, 48, 49). Every reference to the record in the trustee's brief concerning this point relates to persons interested in principal. The guardian-appellee also falls into this error (brief, p. 10) although his brief is barren of any references to the record on this point.

The Theory of the Decision in *Matter of Bank of New York.*

In *Matter of Bank of New York, supra,* p. 463, the basic theory upon which the decision rests seems to be that a discretionary common trust fund is a new type of investment validated for the use of those trust funds in which the fiduciary is given discretion as to investment. If this decision is intended to

mean that the notice of hearing specified in subdivision 12 (appellant's brief, pp. 98-9) has been impliedly approved by a settlor creating a trust prior to the enactment of said Section 100-c because he granted discretion as to investments, we submit that such implied consent is one of those fictions which "deny the fair play that can be secured only by a pretty close adhesion to fact" (*McDonald* v. *Mabee*, *supra*, pp. 91-92). Never before 1937, did any "investment" by a trustee involve a denial to a beneficiary of the right to enforce the trust.

CONCLUSION.

Since Section 100-c of the New York Banking Law deprives the persons interested in the income of this Common Trust Fund of property without due process of law, the judgment appealed from should be reversed.

Respectfully submitted,

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